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## FORMER TESTIMONY AS EVIDENCE.

The testimony of a witness in an action brought by the plaintiff, as next friend of his daughter, to recover for her injuries received in a collision between his buggy and the defendant's street car, was held admissible in a subsequent action by the plaintiff to recover for his own injuries received in the same collision; the witness having since died. This Rhode Island case[1] held, in effect, that the oath and opportunity for cross-examination, besides the all-important requisite of relevancy, were the deciding factors which determined the admissibility of this class of evidence.

The general rule as laid down by the courts and the leading text-writers[2] is to the effect that such testimony will be admitted if there be a substantial identity of parties and issues, yet in

[1] *Lyon v. Rhode Island Co.*, 94 Atl. (R. I.) 893.

[2] Greenleaf on Evidence, § 164. Wigmore on Evidence, § 1386.

its application the authorities seem to be sharply divided. The rule has been strictly interpreted by one line of decisions, and precise identity of parties and issues has been made a mechanical text, rigid compliance with which is necessary to the admissibility of such testimony.[3] The case of *Metropolitan St. Ry. Co. v. Gumby*,[4] on facts similar to those of the principal case, held such testimony inadmissible. The English case, *Morgan v. Nichol*,[5] and the mutuality theory there advanced, i. e., that testimony given against B in a former action, though relevant, cannot now be offered by A against B unless B could have offered it against A, has had a considerable influence on the decisions of these courts. In civil actions arising out of the same transactions with criminal cases, however, the courts have refused to follow the reasoning of the English case, and in accordance with the principal case, have held that the admissibility of this sort of evidence turns more on the oath, and the opportunity for cross-examination on the part of the one against whom the evidence is offered, than on the precise identity of parties and issues.[6] The rule has been given the same liberal interpretation by courts in negligence cases,[7] in an action against a surety on a sheriff's bond,[8] and in disbarment proceedings,[9] though in none of these cases was the party offering such testimony also a party to the previous trial.

The purpose of requiring identity of parties and issues is merely to insure that there was the same degree of motive and interest, as regards the conducting of an adequate cross-examination, at the former trial. If the motive and interest of the party against whom this sort of evidence is offered were fully as strong for an adequate cross-examination at the former trial, as they would be in the present one, and the logical pro-

[3] *Hooper v. Southern Ry. Co.*, 112 Ga. 96; *Patty v. Salem Flouring Co.*, 96 P. (Oregon) 1106; *London Guarantee & Accident Co. v. American Cereal Co.*, 215 Ill. 123.

[4] 99 Fed. 192.

[5] L. R. 2 C. P. 117.

[6] *Kreuger v. Sylvester*, 100 Iowa 647; *Heatley v. Long*, 68 S. E. (Ga.) 783; *North River Ins. Co. v. Walker*, 161 Ky. 368; *Ray v. Henderson*, 144 P. (Okl.) 175. *Contra: McInturf v. Ins. Co. of N. A.*, 155 Ill. App. 225.

[7] *Minnea v. St. Louis Cooperage Co.*, 162 S. W. (Mo.) 741; *Indianapolis & St. Louis Ry. Co. v. Stout*, 53 Ind. 142.

[8] *Woodworth v. Gossline*, 69 P. (Colo.) 705.

[9] *In re Durant*, 80 Conn. 140.

bative value of the testimony be unquestioned, it would seem immaterial that the party offering such testimony was not a party to the previous trial, for the party against whom it is offered has had all the safeguards, i. e., oath, cross-examination, confrontation, and the perjury penalty, the lack of which constitute the only objection to the admission of hearsay.

When it is considered that courts have gone to extremes in admitting much weaker grades of evidence, e. g., declarations against interest, admissions, and dying declarations, the argument for a liberal attitude in admitting this sort of evidence would seem unanswerable. On principle, the doctrine of the principal case would seem to be correct.

F. R.

PERSUADING BREACH OF BAIL BOND TO THE DAMAGE OF ONE NOT A PARTY TO THE BOND AS A TORT.

The Supreme Court of Arkansas has decided recently[1] that one who induces another to forfeit his bond to appear in court is liable for the damage thereby caused to persons under contract, to his knowledge, to indemnify the sureties. The damage sustained was not money paid under the contract of indemnity, but money expended by the plaintiffs in having the prisoner brought back into the jurisdiction from which he fled, so that the judgments on the bail bonds were set aside. The decision was based upon the doctrine that one who maliciously induces another to break a contract to the injury of the person with whom the contract was made, is liable to that person for the damage caused thereby.

At an early date it was decided that a master might maintain an action against one who enticed away his servant or harbored him with knowledge of his former contract.[2] It was held an actionable wrong where the defendant "unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent from the plaintiff."[3] But it was not until the famous case of *Lumley v. Gye*,[4] that the general rule was laid down. This case was approved and followed by the Court of Appeal[5] twenty-eight

[1] *Wakin v. Wakin*, 180 S. W. (Ark.) 471. (McCulloch, C. J., *dissenting*.)

[2] *Hambleton v. Veere*, 2 Saund. 169; *Reg. v. Collingwood*, Ld. Raymond 1116.

[3] *Winsmore v. Greenback*, Willes 577.

[4] 2 El. & Bl. 216. (Coleridge, J., *dissenting*.)

[5] *Bowen v. Hall*, 6 Q. B. D. 333, 337. (Lord Coleridge, C. J., *dissenting*.)